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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

v.

Art Intellect, Inc., a Utah corporation, d/b/a Mason Hill and  
VirtualMG, Patrick Merrill Brody, Laura A. Roser,  
Gregory D. Wood

DEFENDANTS.

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Civil No. 2:11CV00357

Judge: Tena Campbell

**MEMORANDUM IN  
SUPPORT OF  
RECEIVER'S FIRST  
APPLICATION FOR FEES  
AND EXPENSES**

The Securities and Exchange Commission (the "Commission") files this Memorandum in support of the Receiver's First Application for Fees and Expenses ("Fee Application") (Docket # 104). The Commission has reviewed the Receiver's Fee Application carefully, made adjustments before it was filed and finds the fees both necessary and reasonable under the circumstances of this very active and contentious litigation.

## STATEMENT OF FACTS

1. On April 18, 2011, the Commission filed this action, and the Court entered the Orders which, among other things, appointed a receiver over the assets of Mason Hill, and ordered expedited discovery. (Docket #s 4 and 5).
2. Brody and Roser received actual notice of this action and the Orders on or about April 18, 2011, but they attempted to evade service for some time. (See Docket #s 11 and 12). The Court granted the Commission's Motion for Service by Publication and Alternative Means re Defendants Brody, Roser, and Art Intellect, Inc. dba Mason Hill and VirtualMG on April 25, 2011 and extended the TRO Order through May 17, 2011.<sup>1</sup> (Docket #s 13 and 14).
3. On April 25, 2011, Defendants Brody and Roser were properly served with the Complaint, other pleadings, and the Orders. (Docket #s 15 and 16). Defendant Roser, the only registered agent for Defendant Mason Hill, continued to evade service on behalf of Mason Hill; thus the Commission has completed service through publication in the Salt Lake Tribune and Deseret News and by electronic mail, as allowed by this Court's order. (Docket # 13).
4. After being served with the Complaint and Summons, together with all of the Orders, the Defendants Brody and Roser posted advertisements selling frozen assets. The Commission filed a Motion for Order to Show Cause Why Brody and Roser Should Not be Held in Contempt. (Docket # 23).
5. The Court held a status conference on May 17, 2011, in which counsel for Individual Defendants informed the Court that he would permit an inspection and

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<sup>1</sup> Defendant Gregory D. Wood consented to entry of a Final Judgment of Permanent Injunction against him. (Docket #7). The Judgment of Permanent Injunction in favor of Securities and Exchange Commission against Gregory D. Wood was entered on April 20, 2011, and the asset freeze as to Wood was lifted. (Docket #s 8 and 9).

inventory of Brody and Roser's personal residence. The Receiver attended that inventory.

8. Defendants Brody and Roser filed an ex parte Motion for a Protective Order seeking to Stay the sale of assets that had been scheduled by the Receiver. (Docket # 28).

That Motion delayed the sale and increased the costs to the Receivership. (Docket # 33).

9. The Court ultimately denied the Motion for a Protective Order. (Docket # 46).

10. Defendants Roser and Brody filed a Motion to Stay Enforcement of Order requiring the turnover of asset. (Docket # 47).

11. Defendant Brody then filed a Motion for Return of Property Pre-trial, requesting that the Receiver marshal and provide him with information regarding his personal income taxes (Docket # 53).

12. Defendants Brody and Roser filed a Motion for Protective Order seeking to postpone their depositions and the hearing on the Commission's Motion for a Preliminary injunction on June 21, 2011 (Docket # 62).

13. Defendants and Brody have not cooperated in any meaningful way with either the Commission or the Receiver. They have refused to answer questions regarding the location of assets belonging to the Receivership estate; they have refused to vacate the residence that is part of the receivership estate; and, they have refused to permit the receiver to enter into settlement agreements that would benefit the Receivership estate (Docket # 91).

### **ARGUMENT**

The Receiver is entitled to fees and expenses "which are actual, reasonable, necessary, and allowed under the Receivership Order." See United States v. Petters, Civil No. 08-5348

ADM/JSM, 2009 WL 1922320, at \*3 (D. Minn. June 30, 2009). “A receiver appointed by a court who reasonably and diligently discharges his duties is entitled to be fairly compensated for services rendered and expenses incurred.” SEC v. Byers, 590 F. Supp. 2d 637, 644 (S.D.N.Y. 2008) (citing 65 Am.Jur. 2d Receivers § 219 (2d ed. 2008)). The Receivership Order in this case authorizes the Receiver to employ, inter alia, attorneys and accountants when appropriate. In fact, the Receiver sought specific authorization to employ accountant and attorneys. (Docket # 17). That Motion was granted on April 26, 2011. (Docket # 17). Defendants Brody and Roser did not, and have not, objected to the entry of that Order.

The Order Appointing Receiver contemplates that the payment will be done through the assets of the Receivership Estate. Cf. SEC v. Investors Sec. Leasing Corp., 476 F.S Supp. 837, 844 (W. D. Pa. 1979) (“Generally, the courts hold that a receiver’s compensation and the expenses necessarily incurred by him in preserving and caring for the property under an order of court are primarily a charge on and should be paid out of the fund of property in his hands.” (citing 75 C.J.S. Receivers § 302) (some citations omitted).

The determination of the amount awarded to a receiver and the professionals he employs to assist him in the case are in the district court’s sound discretion. See Drilling & Exploration Corp. v. Webster, 69 F.2d 416, 418 (9th Cir. 1984). “The court appointing a receiver has full power to fix the compensation of such receiver and the compensation of the receiver’s attorney or attorneys. In the absence of any statutes fixing the receiver’s compensation or the compensation of the receiver’s attorney, the fixing of such compensations left entirely to the determination of the appointing court.” Id. (citation omitted). Further, as noted by the United States Supreme Court:

The receiver is an officer of the court, and subject to its directions and order. [H]e and counsel fees are considered as

within the just allowances that may be made by the court. So far as the allowances to counsel are concerned, it is a mere question as to their reasonableness. The compensation is usually determined according to the circumstances of a particular case, and corresponds with the degree of responsibility and business ability required in the management of the affairs entrusted to him, and the perplexity and difficulty involved in that management.

Stuart v. Boulware, 133 U.S. 78, 81 82 (1890) (quoted in SEC v. Aquacell Batteries, Inc., No. 6:07-cv-608-Orl-22DAB, 2008 WL 276026, at \*# (M.D. Fla. Jan. 31, 2008). A diligent receiver is entitled to reasonable compensation even if he did not increase the value of the receivership estate. In re Alpha Telecom., Inc., No. CV 01-1283-PA, 2006 WL 3085616, at \*5 (d. Or. Oct. 27, 2006) (citing SEC v. Elliott, 953 F.2d 1560, 1577 (11th Cir. 1992); Donovan v. Robbins, 588 F. Supp. 1268, 1272 (N.D. Ill. 1984)). “While the results obtained by a receiver clearly are important, the benefits to a receivership estate may take ‘more subtle forms than a bare increase in monetary value.’” Byers, 590 F. Supp. 2d 644.

As the agency responsible for investor protection and securities regulation, the Commission takes seriously its mandate to oversee the fees and costs of equity receiverships. Paragraph 61 of the Order Appointing Receiver provides that the Receiver is required to provide the Commission with a copy of the Receiver’s Fee Application. That procedure was followed in this case. As a consequence, courts have recognized that “[o]pposition or acquiescence by the SEC to the fee application will be given great weight.” Byers, 590 F. Supp. 2d at 645.

Brody and Roser suggest that the duties of the Receiver in this case should be limited to “identifying the purchase transactions where the transactions had not closed.” Objection at p. 3. This parsimonious scope of the receivership is not supported by the facts of this case. As already demonstrated through documents and testimony, Brody and Roser operated Mason Hill as their personal piggybank, transferring hundreds of thousands of dollars for personal expenses. The

Receiver has discovered that rents were paid to investors in instances where no tenants existed, that properties were switched without investor consent and that there were no internal accounting controls.

Had Mason Hill operated as a legitimate business, perhaps the scope of forensic accounting targeted by Brody and Roser would have been unnecessary. As it was, Mason Hill maintained many bank accounts, shuffling money among those accounts with no evident business purpose. That conduct alone justifies the forensic accounting undertaken by the Receiver. Further, there are numerous creditors, as well as investors, who were not paid. An appropriate adjudication of those claims also underscores the need for a comprehensive accounting.

There is no small irony in the fact that, having attempted to thwart the Receiver at every opportunity, Brody and Roser now have the temerity to challenge his fees. Brody and Roser's conduct has hindered the Receiver at every opportunity, requiring the Receiver to expend resources to accomplish even ministerial tasks well within the scope of his duties. Brody and Roser's assertion of their rights under the Fifth Amendment also demonstrates the difficulty in litigating this case. As set forth in the Statement of Facts, Brody and Roser are continually filing delaying motions. Although those motions are denied, they still require the Receiver to expend additional resources.

The instant motion is further evidence of that attempt to hinder and delay. The Receiver filed a comprehensive Status Report on July 28, 2011 (Docket # 90) and the Fee Application on August 16, 2011 (Docket # 104). Brody and Roser fail to make specific objection to any particular feature of that application or the status report. Indeed, they do not even argue that the Receiver's hourly rate and that of his associated professionals are unreasonable. Instead, they

merely cite inapplicable state law authority for the unremarkable proposition that a fee application must be justified by the facts and circumstances of the case. Paragraph 3 of the Fee Application states that the fees are “reasonable, necessary and commensurate with the skill and experience required for the activity performed.” The Receiver further certifies that the fees were not incurred for matters that were unnecessary and that the Receiver believes that all fees incurred are in the best interests of investors. (Fee Application at ¶¶ 4, 5). Consequently, the standard cited by Brody and Roser is met in this case.

The Receiver’s Status Report underscores the Receiver’s attention to the complexities and problems posed by this case. In fact, paragraph 66 of the Status Report provides:

Nevertheless, the Receiver is very concerned about the likelihood that his expenses and those of his attorneys may consume most of the funds recovered to date and recovered in the future. If the Court determines that the low likelihood of recovering sufficient funds to make payments to investors means the Receivership should be terminated quickly, the Receiver will propose a plan to accomplish that.

Brody and Roser have not met their burden to demonstrate that the fees in this case are excessive. The Receiver’s fees and costs should be granted.

### **CONCLUSION**

The Commission respectfully requests that this Court approve the fee application submitted by the Receiver in this case.

Dated this 31<sup>st</sup> day of August 2011.

/s/

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